

STANDARDS, PROCEDURES AND PUBLIC APPOINTMENTS COMMITTEE

INQUIRY INTO LOBBYING

SUBMISSION RECEIVED FROM CBI SCOTLAND

CBI Scotland response to Neil Findlay MSP's consultation paper on a Proposed Lobbying Transparency (Scotland) Bill

The CBI is an independent business advocacy organisation funded by its members in industry and commerce and representing firms of all sizes and from all industrial and commercial sectors across Scotland.

We welcome the opportunity to respond to this consultation on the Proposed Lobbying Transparency (Scotland) Bill. It is right that policymakers may wish to reflect on the ways in which policy is influenced and seek to ensure it is influenced in a transparent and proper way.

This written submission has been informed by CBI members including our Trade Association Committee, our Public Services Group, and our Government Relations Network, and was ultimately approved by the CBI Scotland Council at its meeting on 19 September 2012.

1. General comments

Given the important role of lobbying in the public policy making process, regulatory proposals must strike the right balance

Lobbying is crucial to generating effective, informed, consistent, high calibre and pragmatic public policy and legislation, and any regulatory proposals on lobbying must strike the right balance between improving transparency and upholding existing freedoms to put forward views to the Scottish Government and Parliament.

CBI Scotland and its members engage with government and parliamentarians throughout the public policy development process, putting forward views, advice and information both proactively and also at the invitation of government, its agencies, parliamentary committees and individual MSPs. Furthermore some of this interaction is actually required by government, e.g. through the planning system or through the Business & Regulatory Impact Assessments which require officials to engage with firms which may be affected by potential regulations. This dialogue is in the mutual and long-term interest of developing public policy which reflects the needs and realities of Scottish business and the economy.

Optimal public policy outcomes are more likely to be secured where government and parliamentarians openly engage with external parties, taking into account the views of specialists and those affected by public policy decisions. With significant constraints on public finances, this engagement can also provide a cost-effective way for the government to develop public policy.

The need for regulatory convergence across the UK to prevent unnecessary burdens on businesses operating across jurisdictions

The UK Government consulted on proposals to introduce a statutory register of lobbyists in 2012, and has committed to bringing forward primary legislation introducing a register during the course of this Parliament. The CBI is actively engaging with this process and responded to the UK Government consultation in April 2012.

It is entirely appropriate for jurisdictions at a Scotland and a UK level to examine how lobbying transparency can be improved. However, each approach must seek to mitigate against introducing unnecessary burdens upon businesses that operate across the UK, and which would result in having to comply with two different regimes. If proposals for a distinct statutory register are progressed in a devolved context, business believes it is vitally important that it is consistent with proposals at a UK level in order to avoid administrative complexity.

There must be clarification of the problem requiring attention and what a register would achieve before taking proposals further

Detailed questions about how a register would operate in Scotland, who would be covered and the level of information that would be included flow from the acceptance of the assumption that there should be regulation and that the way to regulate is to introduce a statutory register.

We do not believe the consultation document clearly sets out the problem that a statutory register would address, its causes, and how a register would provide a resolution. Nor have we seen wider evidence of a fundamental problem with lobbying necessitating regulatory intervention. Clarification on these points must be provided before proposals are taken forward in Scotland. If this can be demonstrated, policymakers will be better positioned to identify preferred public policy outcomes; if not, there is a risk that the proposals could be perceived as a solution in search of a problem, therefore becoming undermined from the outset.

It is also important to note that many recent so-called lobbying ‘scandals’, which have fuelled calls to introduce regulation in lobbying, constitute examples of improper behaviour by elected representatives rather than being inherent problems with the way lobbying is undertaken that necessitate a regulatory response.

Any proposals for introducing a lobbying register should adhere to the Scottish Government’s principles for better regulation

CBI Scotland has long supported the Scottish Government’s Better Regulation agenda, its five principles of regulation, and the work of the Regulatory Review Group.

Any proposals for bringing forward a statutory register of lobbyists should be judged against the Scottish government’s principles for ‘better regulation,’ which will help ensure final policy outcomes do not have an overly burdensome regulatory impact and can be implemented effectively. This analysis should recognise that the size of

the potential regulatory burden is likely to vary depending on the size and type of organisation that might be covered.

2. Consultation questions

1. Do you support the general aim of the proposed Bill? Please indicate “yes / no / undecided” and explain the reasons for your response.

CBI Scotland understands the general aim of the proposed Bill to be to ensure lobbying in Scotland is made as open and transparent as possible by introducing a statutory register.

We agree with the general aim to ensure lobbying openness and transparency. We are not convinced, however, that a case has been made for introducing a statutory register for this purpose – as highlighted above.

A register is one way of attempting to capture interactions that government and parliamentarians have with external parties but it should be considered alongside other measures that could provide appropriate levels of information on lobbying, such as the disclosure of details of Scottish Government ministers, advisers and senior civil servants’ meetings with external parties through Freedom of Information channels and the existing MSPs’ code of conduct.

2. Do you agree that legislation is a necessary and appropriate means of improving lobbying transparency?

We are not opposed to any legislation where there is evidence of a need for it, and where that legislation is clear, well formulated and does not impose unnecessary burdens on business. However it is not clear that new, additional legislation should be the first and only option for improving transparency in relation to lobbying.

3. Is there any specific international approach to the regulation of lobbyists that represents a good model for developing an approach appropriate for Scotland?

As highlighted in this submission, we do not believe the consultation document clearly sets out the problem that a statutory register would address, its causes, and how a register would provide a resolution.

If a convincing case can be made for this type of regulatory intervention, the Australian model of regulation could possibly provide a model to consider in both Scottish and UK jurisdictions. This could improve transparency – making it clear “who is lobbying and for whom” – without being overly burdensome. It should be noted, however, that such a regime would have the effect of formalising what is already undertaken on a self-regulatory voluntary basis via registers with bodies such as the APPC, PRCA, CIPR and UKPAC, albeit broadening coverage by mandating that third-party lobbying consultancies register.

4. What robust, comprehensive and sufficiently explicit definitions of lobbying and lobbyist can be developed and applied that will ensure all who lobby are captured under the proposals?

In broad terms, 'lobbying' is seeking to inform or influence public policy, government decisions or parliamentary legislation. For the purposes of creating a register, however, the definition of 'lobbying' should be more narrowly drawn because, while external parties communicate with the government and MSPs in a multitude of ways, e.g. by facilitating fact-finding visits to company premises to learn how a business operates, only a small number of those communications might be considered to be germane to the transparency concerns about "who is lobbying and for whom".

5. Who should register on a lobbying register in Scotland?

11. Which organisations should be exempted from registering and why should they be exempted?

(Questions taken together)

An approach similar to the Australian model (i.e. focused on lobbying activities on behalf of a third party client) could improve transparency about "who is lobbying and for whom" by requiring multi-client lobbying consultancies to register. It would not require others such as company in-house teams, charities, trade and business associations, professional bodies, think tanks, expert consultancies (e.g. economic consultants) and trade unions to register.

Requiring in-house employees to register as lobbyists would not further the transparency goal (because it is abundantly clear whom in-house employees represent when they meet public officials), but would impose substantial administrative and financial burdens on businesses who regularly and necessarily interact with the public sector, including those private and third sector organisations which deliver and seek to deliver public services.

In the United States, lobbying regulations with broad coverage have led many in-house teams to establish new compliance departments to administer these requirements, a situation we are seeking to avoid in Scotland and the UK. Significant compliance burdens are typically associated with lobbying laws that regulate in-house employees (such as the US regimes) include instituting and maintaining a company-wide system for tracking employee interactions with public officials, developing a process for aggregating company-wide data and disclosing the relevant information in a single report.

6. Is it necessary or desirable to develop a Code of Conduct for lobbyists to accompany a lobbying register? If so, what key elements should this code include?

We do not support a statutory code of conduct being applied. The policing of such a code would create additional administrative burdens upon the body charged with maintaining the register, which would ultimately increase the financial burden

associated with administering the register – whether this be on the public purse or passed onto those required to register in the form of a fee or levy.

We believe any specific lobbying codes of conduct should be on a voluntary basis.

7. Are the current arrangements, whereby lobbyists are governed only through self-regulatory schemes, adequate or is a statutory regime required in order to regulate lobbying?

We believe current self-regulatory arrangements to be broadly adequate. However, the principal challenge with self-regulation is that, because it is voluntary, organisations can choose whether or not to submit themselves to be regulated. This means that in practice not all third-party lobbying consultancies are covered by self-regulation, which can lead to a transparency gap. Formalising this process with a mandatory scheme is one way of bridging this gap but, as highlighted above, we do not yet believe a convincing case has been made for the existence of a problem sufficient to require regulatory intervention.

8. What do you think is the appropriate and necessary information to be disclosed in order to make lobbying transparent and how regularly should entries be updated?

A desire to provide greater transparency on who is lobbying and for whom must be balanced with the need to maintain essential dialogue between government and parliamentarians and external parties. This must be done in a way that does not create unnecessary and costly administrative burdens on those required to register.

We do not believe that any information about what is discussed at meetings should be included in a register outside of what is already publicly available. Information about general topics discussed is already being provided as part of the UK government's transparency initiative. In addition, Scottish Ministers' meetings with external parties are already subject to Freedom of Information legislation, which include provisions for the release of appropriate information upon request. It is already within the power of MSPs to publish a record of his or her own meetings with lobbyists, as set out in Section 5.1.5 of the Code of Conduct for Members of the Scottish Parliament.

9. Should there be a threshold for inclusion in the lobbying register? If so, what should it be (in terms of time / resources devoted to lobbying, size of organisation, budget, etc.)?

We are yet to be convinced of the case for bringing forward a register. However, if one is brought forward, we have argued that the Australian model provides a useful example to potentially follow. This model would not necessitate the establishment of thresholds.

10. Should it only be contact with MSPs, Ministers and civil servants which should require to be recorded on the register, or should all public officials, including from NDPB's, be included?

It is contact with the Scottish Government and parliamentarians that is presumably of the greatest public interest, and both have the ability already to publish details of such meetings with external parties.

12. Is an independent body required to oversee the register? If so, which organisation should be responsible for administering the register?

We believe a clearer case for bringing forward a statutory register of lobbyists must be set out before views can be productively sought on the status of the organisation that manages and enforces it.

Our initial view is that, in order to keep establishment costs to a minimum, a new organisation need not be created unless there is an overwhelming case for doing so. However, this is subject to identifying an appropriate existing body suitable for administering a proposed statutory register.

13. How will compliance be policed and what investigative and enforcement powers would the overseeing body require?

If a register is brought forward, we consider it important that proportionate sanctions are applied for non-compliance and we are not currently persuaded that these should be criminal.

We would be minded to support some variant of the Australian model, whereby the penalty for non-compliance could be some form of deregistration, but further thought should be given to how this would work in practice in Scotland and with particular regard to the scope of possible non-compliance situations, including not registering, late registration and provision of incomplete or incorrect information. Thus, permanent or long-term deregistration (and consequent deprivation of livelihood) is likely to be disproportionate in all but the most serious cases of deliberate and dishonest default.

In addition, our views on this issue are likely to depend upon the scope of any registration obligation including who is ultimately covered and the level of information required, as well as the overall clarity and certainty of the proposed approach. It is clearly essential that any statutory scheme can be complied with by those subject to it with certainty and confidence about whether or not it applies and, if so, how.

In principle, we consider that a register should enable rather than discourage active engagement between government and external parties. So it might be positioned as a process that rewards users for their active support and participation rather than punishing them for non-compliance. For example, signing up to the voluntary 'transparency register' in Brussels affords access to the European Parliament which is not otherwise automatically available.

14. How should the administration of a statutory register be paid for? And what is your assessment of the likely financial implications (if any) of the proposed Bill to you or your organisation? What (if any) other significant financial implications are likely to arise?

Given the current significantly constrained fiscal environment, a decision would need to be made as to how sensible it would be to prioritise limited public funding on a new statutory declaration and compliance scheme.

We do not believe that sufficient information is provided in the consultation paper to make a judgement as to what a likely or appropriate fee level might be. The actual cost of running the register would depend on how many registrants there were, the range of information the register held, how often it was updated and what (if any) further responsibilities, such as the 'policing' of industry standards, the register's operator was given.

We also draw attention to the distinction between the fee that would be required to register and the overall cost to businesses of administering registration.

15. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

Any fee for registering (cash for access!) should not become a barrier to groups or individuals seeking to put forward views to government. If a register is taken forward, whatever fee level is ultimately agreed, there ought to be provisions for reducing fees for companies with small turnovers. The risk is that a registration fee would present a significant barrier to market entry for businesses seeking to establish themselves as lobbying consultancies as well as placing an undue burden upon businesses with small turnovers already operating in this marketplace. This is particularly important given the preponderance of small businesses and sole-traders operating as lobbying consultants in Scotland.

**CBI SCOTLAND
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